

APPEAL NO. 041807
FILED SEPTEMBER 9, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 14, 2004. The hearing officer determined that the respondent (claimant) sustained a compensable occupational disease/repetitive trauma injury, which included a left wrist injury; that the carrier is not relieved of liability pursuant to Section 409.002, because the claimant timely reported the injury to her employer; that the date of injury is _____; and that the claimant did not have disability. The appellant (carrier) appeals the injury, notice and date-of-injury determinations on the grounds that the claimant's exhibits were not authenticated according to the rules of evidence and that the carrier was denied due process because the claimant refused to answer any questions on cross-examination. In the alternative, the carrier maintains that the challenged determinations are contrary to the great weight of the evidence. There is no response in the file from the claimant. In addition, the claimant did not appeal the determination that she did not have disability and that determination has, therefore, become final pursuant to Section 410.169.

DECISION

Affirmed.

The hearing officer admitted the claimant's exhibits without objection prior to accepting any testimony. He also admitted the carrier's exhibits without objection at the same time. The claimant then rested her case without testifying. The carrier called the claimant as a witness and the claimant refused to answer any questions. The carrier then lodged an objection to the claimant's exhibits based upon her refusal to testify. The hearing officer overruled the objection and declined to exclude the claimant's exhibits. The carrier rested its case.

The carrier argues that the hearing officer erred in failing to exclude the claimant's exhibits after she refused to testify because the exhibits were not authenticated in accordance with the Texas Rules of Evidence. In accordance with Section 410.165(a), conformity to legal rules of evidence is not required; thus, we cannot agree that the hearing officer erred in his evidentiary ruling because the exhibits were not authenticated in accordance with the Rules of Evidence.

The carrier also argues that the hearing officer erred in giving consideration to the claimant's exhibits because it was denied an opportunity to cross-examine the claimant about her exhibits and their contents. The carrier's arguments in this regard actually go to the weight to be given the evidence rather than its admissibility. Pursuant to Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence and it was a matter for him to consider the effect of the claimant's refusal to testify in making his credibility determinations. Nor can we agree that the

carrier was denied due process in this instance because the claimant would not testify. The hearing officer permitted the carrier to call the claimant as a witness and she declined to answer questions. At that point, in the absence of contempt powers, there was nothing further the hearing officer could do to compel the claimant's testimony. In essence, the claimant made a tactical decision to rely exclusively on documentary evidence to prove her claim. We are unprepared to say that under the 1989 Act the claimant is prohibited from doing so and the carrier cites no authority to support such a proposition.

Finally, the carrier argues that the hearing officer erred in assigning any credibility to the claimant's assertions in her exhibits. The hearing officer did not err in determining that the claimant sustained a compensable occupational disease/repetitive trauma injury; that the date of injury is _____; and that she reported the injury to her employer in a timely manner. Those issues presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There was conflicting evidence on the disputed issues and the hearing officer was acting within his province as the fact finder in giving more weight to the evidence tending to demonstrate that the claimant did sustain a compensable disease/repetitive trauma injury to her left wrist, that the date of injury was _____, and that the carrier was not relieved of liability pursuant to Section 409.002 because the claimant timely reported the injury to her employer. The hearing officer could reasonably draw an inference from the videotape evidence depicting the claimant's job duties and the documentary evidence that the claimant's job was of such a nature that the movement of her hands as she assembled vacuum cleaner parts could result in a compensable repetitive trauma injury. Although another fact finder may have drawn different inferences from the evidence and reached a different decision, nothing in our review of the record reveals that the challenged determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the determinations on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Edward Vilano
Appeals Judge